

# ASARCO

FEB 23 2000

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## East Helena Plant

John R. Shaw  
Plant Manager

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

February 18, 2000

John Wardell  
Director  
United States Environmental Protection Agency  
Region VIII, Montana Office  
301 South Park, Drawer 10096  
Helena, MT 59626-0096

Re: Demand for Payment of Stipulated Penalties Pursuant  
to Consent Decree in Civil Action No. CV98-3-H-CCL

Dear Mr. Wardell:

On February 11, 2000, I wrote you to invoke informal dispute resolution pursuant to Paragraph 198 of the subject Consent Decree with respect to a demand for payment of stipulated penalties received at ASARCO's East Helena plant on February 8, 2000. On closer review of the Consent Decree and discussion with counsel, I have determined that my letter may not have sufficed to commence informal dispute resolution, and, accordingly, I am following up with this letter.

Paragraph 198 of the Consent Decree apparently requires a dispute notice to set forth "the specific points of the dispute . . . and any matters, or other information, which the disputing party considers necessary or appropriate." ASARCO disputes that it is properly liable for the \$40,000.00 stipulated penalty asserted by EPA for the following reasons:

1. The liquid allegedly observed by Montana and EPA inspectors on November 4, 1999 to be "leaking through the limestone berms" was not "plant process water" as that term is used in Paragraph IV.15.b. of the Decree. It was never contemplated by EPA, the Department of Justice or ASARCO, that this term would apply to moisture associated with plant process residues destined for legitimate recycling, as distinct from the large volume of water normally contained in the plant process water circuit. EPA's expansive interpretation of the Consent Decree provision at issue lacks any foundation in the negotiating record.

2. The alleged "leak" observed by Montana and EPA was contained on concrete. The Agency has no information to indicate that the liquid actually was "released to the environment." Moreover, ASARCO contests the assertion that the liquid was "travelling toward lower lake." The surface gradient in the area of the bins observed by the inspectors would not allow the liquid to move in the direction of lower lake.

3. The penalty demand "estimates" 32 days of violation and asserts a penalty of \$40,000.00. Under Paragraph 181 of the Decree, in the absence of a violation that continues beyond a 14<sup>th</sup> consecutive day, the appropriate penalty calculation would be \$32,000.00, or \$1,000.00 per day.

While disputing the Agency's characterization of the observed management of its tank bottom sediment and associated moisture as a violation of the Decree, in invoking dispute resolution, ASARCO must also express its concern regarding the practical implications of EPA's interpretation of the Decree. Surely, the Agency can't mean that every time ASARCO removes process residues from the plant process system that the associated moisture is "plant process water" being managed "outside the plant process water circuit." This interpretation would seriously impede a host of necessary and desirable maintenance and recycling practices at the plant.

Under Paragraph 184 of the Consent Decree, stipulated penalties are to be paid by the 15<sup>th</sup> day of the month following the month in which ASARCO becomes aware of the violation. However, Paragraph 204 of the Consent Decree appears to stay the requirement for payment of the stipulated penalty pending resolution of a dispute. Accordingly, if the present penalty demand remains in dispute on March 15, 2000, ASARCO does not plan to pay any penalty by that date. I would trust you will advise us if you believe any different interpretation of the Decree is in order with respect to timing of payment of the disputed penalty.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Shaw", is written over a horizontal line.

John R. Shaw  
Plant Manager

cc: Chuck Figur  
Susan Zazzali  
Mike Goodstein